

104TH CONGRESS
1ST SESSION

H. R. 914

To amend the Comprehensive Environmental Response, Compensation, and Liability Act and the Solid Waste Disposal Act to limit the liabilities under these Acts of both fiduciaries and lending institutions, including finance lessors, guarantors, and others directly or indirectly holding indicia of ownership primarily to protect a security interest in property which is subject to either Act.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 13, 1995

Mr. LAFALCE introduced the following bill; which was referred to the Committee on Commerce and, in addition, to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act and the Solid Waste Disposal Act to limit the liabilities under these Acts of both fiduciaries and lending institutions, including finance lessors, guarantors, and others directly or indirectly holding indicia of ownership primarily to protect a security interest in property which is subject to either Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Environmental Lender
3 and Fiduciaries Liability Amendments Act of 1995”.

4 **SEC. 2. AMENDMENTS TO COMPREHENSIVE ENVIRON-**
5 **MENTAL RESPONSE, COMPENSATION, AND LI-**
6 **ABILITY ACT OF 1980.**

7 The Comprehensive Environmental Response, Com-
8 pensation, and Liability Act of 1980 is amended—

9 (1) by striking the last sentence of paragraph
10 101(20)(A); and

11 (2) by inserting the following new paragraphs
12 101(20) (E) and (F):

13 “(E)(i) The term ‘owner or operator’ does
14 not include a person who, without participating
15 in the management of a vessel or facility, holds
16 indicia of ownership primarily to protect his or
17 her security interest in the vessel or facility.

18 “(ii) The term ‘indicia of ownership’ means
19 any legal or equitable interest in property ac-
20 quired directly or indirectly—

21 “(I) for the purpose of securing pay-
22 ment of a loan or indebtedness, a right of
23 reimbursement or subrogation under a
24 guaranty, or the performance of another
25 obligation,

1 “(II) evidencing ownership under a
2 lease financing transaction where the les-
3 sor does not initially select or ordinarily
4 control the daily operation or maintenance
5 of the property, or

6 “(III) in the course of protecting a se-
7 curity interest or right of reimbursement
8 or subrogation under a guaranty.

9 ‘Indicia of ownership’ include evidence of inter-
10 ests in mortgages, deeds of trust, liens, surety
11 bonds, guaranties, lease financing transactions
12 where the lessor does not initially select or ordi-
13 narily control the daily operation or mainte-
14 nance of the property, other forms of encum-
15 brances against property recognized under ap-
16 plicable law as vesting the holder of the security
17 interest with some indicia of title, legal or equi-
18 table title obtained at, or in lieu of, foreclosure,
19 and their equivalents. A person may, but is not
20 required to, hold title in property in order to
21 hold indicia of ownership in that property.

22 “(iii) A ‘holder of a security interest’ is a
23 person who holds indicia of ownership in prop-
24 erty primarily to protect a security interest. A
25 ‘holder of a security interest’ includes the initial

holder (such as a loan originator) and any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); guarantor; lease financier or any successor where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property; any person who holds indicia or ownership primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder of a security interest.

“(iv) The term ‘security interest’ means an interest in property created or established for the purpose of securing a loan, right of reimbursement or subrogation under a guaranty, or other obligation or constituting a lease financing transaction. Security interests include mortgages, deeds of trust, liens, lease financing transactions in which the lessor does not initially select or ordinarily control the daily operation or maintenance of the property, trust receipt transactions, and their equivalents. Security interests may also arise from transactions such as sales and leasebacks, conditional sales, installment sales, certain assignments, factoring

1 agreements, accounts receivable financing ar-
2 rangements, and consignments, if the trans-
3 action creates or establishes an interest in prop-
4 erty for the purpose of securing a loan, right of
5 reimbursement or subrogation under a guaranty
6 or other obligation.

7 “(v) The term ‘participating in the man-
8 agement of property’ means actual participation
9 in the management or operational affairs of the
10 property by the holder, and does not include the
11 mere capacity to influence, or ability to influ-
12 ence, or the unexercised right to control facility
13 operations. A holder is participating in manage-
14 ment while the borrower is still in possession of
15 the property encumbered by the security inter-
16 est, only if the holder either—

17 “(I) exercises decisionmaking control
18 over the borrower’s environmental compli-
19 ance, such that the holder has undertaken
20 responsibility for the borrower’s solid waste
21 handling or disposal practices; or

22 “(II) exercises control at a level com-
23 parable to that of a manager of the bor-
24 rower’s enterprise, such that the holder
25 has assumed or manifested responsibility

1 for the overall management of the enter-
2 prise encompassing the day-to-day deci-
3 sionmaking of the enterprise with respect
4 to—

5 “(aa) environmental compliance;

6 or

7 “(bb) all, or substantially all, of
8 the operational (as opposed to finan-
9 cial or administrative) aspects of the
10 enterprise other than environmental
11 compliance. Operational aspects of the
12 enterprise include functions such as
13 that of facility or plant manager, op-
14 erations manager, chief operating offi-
15 cer, or chief executive officer. Finan-
16 cial or administrative aspects include
17 functions such as that of credit man-
18 ager, personnel manager, controller,
19 chief financial officer, or similar func-
20 tions.

21 “(vi) The term ‘primarily to protect a se-
22 curity interest’ includes indicia of ownership ac-
23 quired as a consequence of having or exercising
24 rights as a holder of a security interest where
25 the same is necessary or appropriate to protect

1 the security interest, to provide for compliance
2 with laws, to preserve the value of the property
3 or benefits therefrom, or to recover a loan, in-
4 debtedness or right of reimbursement or sub-
5 rogation under a guaranty or to redress any
6 other obligation secured by such interest or to
7 recover property subject to a finance lease. A
8 holder of a security interest who directly or in-
9 directly acquires full title or a right to title or
10 possession of such property upon default under
11 the security interest, or at, or in lieu of, fore-
12 closure, or, in the case of a finance lease, upon
13 expiration, cancellation, or termination of such
14 lease, shall continue to hold indicia of owner-
15 ship primarily to protect a security interest so
16 long as such holder is diligently proceeding to
17 sell or convey title or the right to title or to re-
18 lease such property on commercially reasonable
19 terms at the earliest possible time, while pre-
20 serving the property in the interim.

21 “(vii) The term ‘property’ means real and
22 personal property and includes facilities, stor-
23 age tanks, equipment, vessels, vehicles, and
24 other modes of transportation whether by sea,
25 land, or air.

1 “(viii)(I) The term ‘guarantor’ includes
2 guarantors and sureties of security interests,
3 securities, and other obligations, issuers of let-
4 ters of credit and other credit enhancements,
5 title insurers, and entities which directly or in-
6 directly acquire indicia of ownership in the
7 course of protecting a security interest or acting
8 as such guarantors, sureties, issuers of letters
9 of credit or other credit enhancements or title
10 insurers, and the term ‘guaranty’ includes guar-
11 anties, surety bonds, title insurance policies, let-
12 ters of credit and other credit enhancements,
13 and other agreements with a guarantor relating
14 to the obligations described in this subclause
15 (I).

16 “(II) ‘Directly or indirectly’ includes any
17 interest in property, security interest, indicia of
18 ownership title, or right to title held or acquired
19 by a fiduciary or similar entity for the benefit
20 of a holder of a security interest.

21 “(ix) The terms ‘borrower’, ‘debtor’, and
22 ‘obligor’ mean a person whose property is en-
23 cumbered by a security interest and includes a
24 lessee under a lease financing transaction.

1 “(x) Actions taken by a holder of a secu-
2 rity interest to foreclose, sell, liquidate, release
3 or otherwise divest or cause the transfer of
4 property subject to a security interest; or pre-
5 serve or protect the value of such property; or
6 otherwise to exercise rights of a holder of a se-
7 curity interest specified in subparagraph (v)
8 above; or to assist the borrower, debtor, obligor,
9 or lessee in winding down its operations or ac-
10 tivities related to such property; or to abandon
11 or release the property prior to foreclosure or
12 its equivalents; or to require or conduct re-
13 sponse action on, or relating to, the property;
14 shall not be deemed ‘participating in the man-
15 agement of property’ within the meaning of this
16 subsection (101)(20)(E). Completion of an envi-
17 ronmental inspection or evaluation consistent
18 with good commercial or customary practice by
19 or for the use of a holder of a security interest
20 is probative evidence that a holder of a security
21 interest is acting to preserve and protect the
22 property during the time the holder of a secu-
23 rity interest may have possession or control of
24 such property, except that this Act does not re-
25 quire a holder of a security interest to conduct

1 nor does it require any environmental inspec-
2 tion or evaluation to qualify for this exemption.

3 “(xi) A holder of a security interest who,
4 in taking actions referred to in subparagraph
5 (x) above respecting property, actively and di-
6 rectly causes or exacerbates a release of a haz-
7 ardous waste for which a Federal or an author-
8 ized State government determines that response
9 action is necessary, shall be liable for the cost
10 of such response action to the extent only that
11 the release is directly attributable to such hold-
12 er’s activities, except that such a holder shall
13 not be liable for response action costs arising
14 from a release which commences before and
15 continues after such holder takes any action re-
16 ferred to in subparagraph (x) above.

17 “(F)(i) The term ‘fiduciary’ means any en-
18 tity which is considered a fiduciary under sec-
19 tion 3(21) of the Employee Retirement Income
20 Security Act of 1974, as amended from time to
21 time, or who is acting as trustee, executor, ad-
22 ministrator, custodian, guardian of estates, con-
23 servator, committee of estates of disabled per-
24 sons, personal representative, receiver, agent,

1 nominee or in any other fiduciary capacity for
2 the benefit of another entity.

3 “(ii) A fiduciary who acquires ownership or
4 control of property without having owned, oper-
5 ated, or participated in the management of that
6 property prior to assuming ownership or control
7 as fiduciary, other than for the benefit of a
8 holder of a security interest, shall not be an
9 ‘owner’ or ‘operator’ under this Act.

10 “(iii) Such a fiduciary who willfully, know-
11 ingly, or recklessly causes (in a direct and ac-
12 tive manner) a release of a hazardous sub-
13 stance, for which a Federal or an authorized
14 State government determines that response ac-
15 tion is necessary, shall be liable for the cost of
16 such response action to the extent only that the
17 release is directly attributable to the fiduciary’s
18 activities, except that such a fiduciary shall not
19 be liable for response action costs arising from
20 a release which commences before and contin-
21 ues after such fiduciary acquires ownership or
22 control of the property.

23 “(iv) Nothing in this subsection shall pre-
24 vent claims against the assets that constitute
25 the estate held by the fiduciary or the filling of

1 actions against the fiduciary in its representa-
2 tive capacity.”.

3 **SEC. 3. AMENDMENTS TO SOLID WASTE DISPOSAL ACT.**

4 The Solid Waste Disposal Act is amended—

5 (1) by adding at the end of section 1004 the
6 following paragraph:

7 “(41) The terms ‘owner’, ‘operator’, ‘generator’,
8 ‘transporter’, and ‘person’ do not include any entity
9 which would not be an ‘owner’ or ‘operator’ within
10 the meaning of paragraphs 101(20) (E) or (F) of
11 the Comprehensive Environmental Response, Com-
12 pensation, and Liability Act of 1980.”;

13 (2) by adding at the end of paragraph
14 9003(h)(a) the following sentence: “This definition
15 shall be construed to be parallel to the provisions of
16 paragraph 101(20)(E) of the Comprehensive Envi-
17 ronmental Response, Compensation, and Liability
18 Act of 1980.”, and

19 (3) by adding at the end of section 3006 the
20 following subsection:

21 “(i) AMENDMENTS MADE BY 1993 ACT.—The provi-
22 sions of section 1004(41) of this Act shall apply in each
23 State having an interim or finally authorized State pro-
24 gram to the same extent that such provisions apply in
25 other States.”.

1 **SEC. 4. SCOPE OF APPLICATION.**

2 The provisions of this Act shall apply to—

3 (1) all indicia of ownership acquired prior to
4 the date of enactment that are held primarily to pro-
5 tect a security interest in property; and

6 (2) each fiduciary with respect to any property
7 acquired by the fiduciary prior to the date of enact-
8 ment.

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